

LIV Celebrating  
**150**  
years



**Law  
Institute  
Victoria**

27 August 2009

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

By email to: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary

### **Inquiry into the *Marriage Equality Amendment Bill 2009***

The LIV supports the *Marriage Equality Amendment Bill 2009* (the Bill) with some amendments which we have set out below. In particular, we suggest that the term 'sexual orientation' be substituted for the term 'sexuality'. The LIV endorses the Bill's intention to remove all discrimination from the *Marriage Act 1961* (the *Marriage Act*) by allowing marriage between 'two people' as opposed to limiting it to marriage between 'a man and a woman' and we urge the Senate Legal and Constitutional Affairs Committee to recommend that the Bill be passed.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. We have been a strong advocate for the removal of laws that discriminate on the basis of sexual orientation and gender identity, approving a policy to that effect in 2007<sup>1</sup> and making submissions to different governments and bodies on the issue over time.

Notably, the LIV made a submission in July 2004 to this same Committee's *Inquiry into the Provisions of the Marriage Legislation Amendment Bill 2004*, opposing the amendments proposed (and subsequently passed into law)<sup>2</sup> in the *Marriage Legislation Amendment Bill 2004* to define marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.<sup>3</sup> The LIV submitted then as it does now that denying same sex couples the right to marry is a restraint on individual freedom, which is not justified by reference to the interests of society as a whole.<sup>4</sup> While we fully supported the creation of the Victorian Relationships Register,<sup>5</sup> we do not consider that it or similar schemes go far enough to recognise the equal rights of all people to marry, regardless of their sex, sexual orientation or gender identity.

### ***The Marriage Act violates Australia's international obligations***

The LIV considers that the definition of 'marriage' in s.5 of the *Marriage Act* to mean 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life' unjustifiably discriminates on the basis of sex, sexual orientation and gender identity in breach of Australia's international obligations. We support the Bill's proposed change to the definition of marriage to refer to the 'union of two people' (Schedule 1, clause 1 of the Bill).

As a State Party to the *International Covenant on Civil and Political Rights* (ICCPR), Australia has undertaken to ensure that:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Article 26)*

The Law Institute of Victoria  
is a member of



**Law Council**  
OF AUSTRALIA

**Law Institute of Victoria Ltd**

ABN 32 075 475 731

**Ph (03) 9607 9311** Fax (03) 9602 5270

Email [lawinst@liv.asn.au](mailto:lawinst@liv.asn.au)

470 Bourke Street Melbourne 3000 Australia

DX 350 Melbourne GPO Box 263C Melbourne 3001

Website [www.liv.asn.au](http://www.liv.asn.au)

This right of non-discrimination, which Australia has freely accepted, is an international legal obligation to honour and protect all persons. Australia has also undertaken to uphold and respect the right of all to marry

and establish a family (ICCPR Article 23; see also *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Article 10) without discrimination (ICCPR and ICESCR Article 2).

The international unlawfulness of sexual orientation discrimination, as it applies to same sex couples, was considered in the case of *Young v Australia*<sup>6</sup> (*Young*). In *Young*, the United Nations Human Rights Committee (HRC) held that such discrimination violated Australia's treaty obligations. The HRC concluded that Mr Young 'is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law', and that Australia 'is under an obligation to ensure that similar violations of the Covenant do not occur in the future.' In light of the decision in *Young*, the LIV believes that the *Marriage Act* contravenes Australia's treaty obligations. It is also inconsistent with jurisprudence in Australia and overseas.<sup>7</sup>

It should be noted that, in connection with Australia's observance of its commitments under Articles 2 and 26 of the ICCPR, the HRC recently stated that it 'remains concerned that the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law'.<sup>8</sup>

The LIV also considers that s.88EA of the *Marriage Act*, providing that same sex unions solemnised in a foreign country must not be recognised as marriages in Australia, is also in breach of Australia's international commitments under both the ICCPR and the 1978 *Convention on Celebration and Recognition of the Validity of Marriages* (the *Hague Convention*). We support the Bill's proposal to repeal s.88EA (Schedule 1, clause 5 of the Bill).

The purpose of the *Hague Convention* is to 'facilitate the celebration of marriages and the recognition of the validity of marriages' between Contracting States. With the exception of certain marriages, as set out in Articles 8 and 11, it is generally accepted that a marriage 'validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States'.<sup>9</sup> As a Contracting State, Australia has an obligation to recognise foreign marriages validly entered into in other Contracting States. While the *Hague Convention* does not define marriage, the LIV submits that marriage should be interpreted in its broadest, internationalist sense.

Article 5 of the *Hague Convention* provides that the 'application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the State of celebration'. Based on polls,<sup>10</sup> public opinion in Australia is in favour of recognising same sex marriages and there is, in the LIV's view, no international legal basis upon which Australia can justify its non-recognition of foreign same sex unions.

Finally, it should also be noted that the provisions of the *Marriage Act* that discriminate on the basis of sex, sexual orientation and gender identity are inconsistent with the 2008 Statement to the General Assembly on *sexual orientation and gender identity* which was supported by Australia.<sup>11</sup>

## **Suggested changes to the Bill**

While the LIV supports the Bill in principle, we would suggest that it be amended in the following respects:

- Substitute throughout the Bill the term 'sexual orientation' for the ambiguous term 'sexuality'. 'Sexual orientation' is the term used in international law, in particular in the interpretation of the ICCPR.<sup>12</sup> It is also the term used in Victoria, Tasmania and Western Australia.<sup>13</sup>
- Reinstate into the definition of marriage in s.5 of the *Marriage Act* the phrase 'to the exclusion of all others.' This phrase concerns polygamy which raises a different set of issues from those intended to be addressed in the Bill, namely discrimination on the basis of sex, sexual orientation and gender identity.
- Sections 2 and 4 of the Schedule to the Bill, replacing s.45(2) and s.72(2), are unnecessary and should be omitted. The words 'or words to that effect' in the *Marriage Act* suffice to allow a couple to write their own words, in the same way that the Bill's new wording proposes.

Recent legislative changes – such as *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (No. 144, 2008) and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (No. 134, 2008) – demonstrate some willingness on behalf of the federal government to address, and remove, statutory discrimination against same sex couples. They do not, however, address the wide range of discriminatory laws and policies that affect lesbian, gay, bisexual and transgender people in both government and private sector arenas. They make stark the lack of a federal anti-discrimination law on sexual orientation and gender identity.

The LIV calls on the federal government to support the *Marriage Equality Amendment Bill 2009*, with the changes we have proposed, in its next step to remove laws that discriminate on the basis of sexual orientation and gender identity.

Please contact Alice Palmer, Lawyer for the LIV's Administrative Law and Human Rights Section, at [lhelm@liv.asn.au](mailto:lhelm@liv.asn.au), if you wish to discuss the matter.

Yours sincerely,



**Danny Barlow**  
President  
Law Institute of Victoria

CC The Hon Robert McClelland MP by email to [attorney@ag.gov.au](mailto:attorney@ag.gov.au)  
The Hon Rob Hulls MP by email to [rob.hulls@parliament.vic.gov.au](mailto:rob.hulls@parliament.vic.gov.au)

<sup>1</sup> LIV Policy Statement 'Removal of Discrimination against People on the Basis of Gender Identity or Sexual Orientation' available at <http://www.liv.asn.au/members/sections/admin/pdf/2007discriminationPolicyStatement.pdf>.

<sup>2</sup> By the *Marriage Amendment Act 2004*

<sup>3</sup> LIV Submission to the Senate Legal and Constitutional Committee *Inquiry into the provisions of the Marriage Legislation Amendment 30 July 2004* (attached).

<sup>4</sup> See also LIV submission to the Human Rights Consultation Committee on the Human Rights Consultation June 2009 [https://www.liv.asn.au/members/sections/submissions/20090615\\_65/20090615\\_LIVnhrcsubmission.pdf](https://www.liv.asn.au/members/sections/submissions/20090615_65/20090615_LIVnhrcsubmission.pdf)

<sup>5</sup> See e.g. LIV Submission to the Victorian Attorney-General on the Relationships Bill 2007 January 2008 [https://www.liv.asn.au/members/sections/submissions/20080130\\_10/20080130\\_RelationshipsBill2007.pdf](https://www.liv.asn.au/members/sections/submissions/20080130_10/20080130_RelationshipsBill2007.pdf)

<sup>6</sup> CCPR/C/78/D/941/2000 (18 September 2003) at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3c839cb2ae3bef6fc1256dac002b3034?Opendocument). It is noted that an earlier decision of the Human Rights Committee in *Joslin v New Zealand* CCPR/C/75/D/902/1999 (30 July 2002) at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e44ccf85efc1669ac1256c37002b96c9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e44ccf85efc1669ac1256c37002b96c9?Opendocument) found that the marriage right in article 23.2 of the ICCPR was an obligation on States Parties to allow heterosexual marriages. We would argue, however, that any authoritative weight that might be given to *Joslin* is undermined by the subsequent findings in *Young*.

<sup>7</sup> See *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 (12 October 2001), which we argue applies equally to same-sex marriage. See also *Varnum v Brien*, Supreme Court of Iowa 07-1499 (see [www.judicial.state.ia.us/Supreme\\_Court](http://www.judicial.state.ia.us/Supreme_Court)), a unanimous decision of the Supreme Court of the State of Iowa finding there are no valid reasons to deny access to marriage to same-sex couples.

<sup>8</sup> Human Rights Committee of the United Nations, Consideration of reports submitted by states parties under article 40 of the covenant: Concluding observations of the Human Rights Committee, Australia, UN Doc CCPR/C/AUS/CO/5 (16 March – 3 April 2009), <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>, para 12.

<sup>9</sup> Article 9, Hague Convention.

<sup>10</sup> A Galaxy Poll in June 2009 showed that support for equal marriage laws is substantial: Three in five (60%) of Australians agree that same sex couples should be able to marry in Australia (27% strongly agree, 34% agree). This is higher than the 36% who disagree. See <http://australianmarriageequality.com/Galaxy200906.pdf>.

<sup>11</sup> General Assembly, Sixty-third Session, 70th plenary meeting, Thursday, 18 December 2008, 10 a.m. New York, Statement made by Argentina, A/63/PV.70, 30 <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/660/58/pdf/N0866058.pdf?OpenElement>; see also report at <http://www.hrw.org/en/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>.

<sup>12</sup> *Young v Australia*, above n.6, e.g. para 10.4. See also *Toonen v Australia* Human Rights Committee, CCPR/C/50/D/488/1992 (31 March 1994).

<sup>13</sup> See e.g. the *Equal Opportunity Act 1995* (Vic), s.4 defines 'sexual orientation' to mean 'homosexuality (including lesbianism), bisexuality or heterosexuality' and s.6(l) lists 'sexual orientation' as one of the attributes upon which discrimination is made unlawful.